

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF COMMERCE

In the Matter of the Resident  
Insurance Producer's Application  
of Brett Isaac Maxwell

**FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATION**

The above-entitled matter came on for a hearing before Administrative Law Judge Barbara L. Neilson on Tuesday, February 7, 2006, at 9:30 a.m. at the Office of Administrative Hearings in Minneapolis, Minnesota. Michael J. Tostengard, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota 55101-2130, appeared on behalf of the Department of Commerce ("the Department"). Brett Maxwell, 914 - 15<sup>th</sup> St. N.W., Bemidji, Minnesota 56601, appeared on his own behalf, without an attorney. The OAH record closed at the conclusion of the hearing on February 7, 2006.

**NOTICE**

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the office of Kevin Murphy, Deputy Commissioner of Commerce, 85<sup>th</sup> Seventh Place East, Suite 500, St. Paul, Minnesota 55101-2198, for information about the procedure for filing exceptions or presenting argument.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

## **STATEMENT OF ISSUES**

The issue presented in this case is whether the Department's denial of the Respondent's application for a resident insurance producer should be affirmed because the Respondent entered a guilty plea in 1997 to criminal sexual conduct in the second degree and thus has committed a crime involving "moral turpitude" under Minn. Stat. § 60K.43(6) (2004).

The Administrative Law Judge recommends that the denial of the Respondent's application be reversed because the conviction does not directly relate to the occupation of insurance producer, the Respondent has been law-abiding since the conviction, and more than ten years have elapsed since the last violation occurred.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

## **FINDINGS OF FACT**

1. The Respondent, Brett Maxwell, is a 35-year-old man who has been employed for the past eight years with a telemarketing company. Prior to that time, the Respondent was in the Army. He received an honorable discharge from the Army in approximately 1997.

2. The telemarketing company for which the Respondent works has recently begun handling calls for companies offering insurance coverage. Based upon the Respondent's record and years of service, his employer asked him if he would be interested in obtaining an insurance producer's license so that he would be able to respond to incoming calls about insurance and possibly provide assistance over the phone to people in filling out applications. If the Respondent obtained his insurance license and was able to handle these calls, his hourly pay would increase from \$10.29 per hour to approximately \$14.29 per hour. He would not gain access to or handle clients' money in connection with these telephone calls, nor would he receive commissions based on his sales. The Respondent's employer is aware of his conviction.<sup>[1]</sup>

3. The Respondent thereafter attended training and took the insurance producers test. He applied to the Department of Commerce for a resident insurance producer's license on or about June 29, 2005. The Respondent checked "yes" in response to a question on the application asking whether he had ever been "charged, indicted, pleaded to, or convicted of any criminal offense in any Court" other than misdemeanor traffic violations. He also submitted a form authorizing the Department of Commerce to conduct a criminal background check.<sup>[2]</sup>

4. On November 6, 1996, a complaint was filed in Beltrami County charging the Respondent with criminal sexual conduct in the first degree under Minn. Stat. § 609.342, subd. 1(a), based on allegations that the Respondent engaged in sexual penetration with a person who was under 13 years of age and more than 36 months younger than he. The criminal complaint alleged that the Respondent's sister-in-law reported in July 1996 that the Respondent had engaged in inappropriate sexual contact with her on three separate occasions: (1) in September 1993 at her residence in Beltrami County, when she was 11 years old; (2) in April of 1994 at the Respondent's parents' residence in Beltrami County, when she was 12 years old; and (3) in November of 1995, during a car trip with the Respondent and his wife and children, when she was 13 years old. The Respondent was in Minnesota on leave from the Army on these dates.<sup>[3]</sup>

5. In June of 1997, the Respondent pleaded guilty to criminal sexual conduct in the second degree, which is a felony. The plea was entered on December 31, 1997. The Respondent was sentenced to serve six months in the Beltrami County Jail. He was also ordered to have no contact with minor females, pay full restitution, pay a fine of \$1,228.00, and follow all recommendations from his sex offender evaluation. He was placed on probation for an indeterminate period not to exceed 25 years. His probation will expire on November 23, 2022.<sup>[4]</sup>

6. Following his conviction, the Respondent spent 100 nights in the County Jail and was given work release during the day. He has paid the fine ordered by the Court and has complied with all terms of probation. He completed two years of group sex offender treatment at a mental health center in Bemidji and graduated from that treatment program. He also attended more than six months of after-care treatment which is offered to graduates of the treatment program. During the nine years since his conviction, Respondent has not committed any other criminal offenses of any kind.<sup>[5]</sup>

7. The Department of Commerce reviewed the Respondent's application for a resident insurance producer's license and documentation relating to his conviction, and determined that the application should be denied under Minn. Stat. § 60K.43(6) (2004) because the Respondent had been convicted of a crime involving moral turpitude.<sup>[6]</sup>

8. By letter dated January 28, 2006, Sherry Hill, the Respondent's probation officer, confirmed that the Respondent has completed all court-ordered conditions including sex offender treatment and has not been brought before the Court for any type of violation during his nine years of supervision. Ms. Hill indicated Respondent "has always been responsible while on supervision and has always maintained full time employment." She noted that Respondent had been working with the same company for a long period of time and "[m]ore than anything is trying to make a living for his wife and children."<sup>[7]</sup>

9. The Department issued an Order Denying License Application, Statement of Charges, and Notice of Right to Hearing on December 28, 2005. The Notice originally set the hearing for January 25, 2006. The hearing was later rescheduled for February 7, 2006.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

## **CONCLUSIONS**

1. The Administrative Law Judge and the Commissioner of Commerce are authorized to consider the charge against Respondent under Minn. Stat. §§ 45.027, subd. 7, 14.50, and 60K.43 (2004).

2. The Respondent received due, proper and timely notice of the charges against him, and of the time and place of the hearing. This matter is, therefore, properly before the Commissioner and the Administrative Law Judge.

3. The Department has complied with all relevant procedural legal requirements.

4. The burden of proof in this proceeding is on the Respondent to show by a preponderance of the evidence that he should be granted a license in this matter.<sup>[8]</sup>

5. The Commissioner of Commerce may deny an application for a resident insurance producer's license if the Commissioner finds that it is in the public interest to do so and the applicant has "pled guilty, with or without explicitly admitting guilt, pled nolo contendere, or been convicted of a felony, gross misdemeanor, or misdemeanor involving moral turpitude, including, but not limited to, assault or similar conduct."<sup>[9]</sup>

6. Minn. Stat. § 45.027, subd. 10, specifies that "Chapter 364 [relating to rehabilitation of those convicted of crimes] does not apply to an applicant for a license . . . where the underlying conduct on which the conviction is based would be grounds for denial of the license."

7. The underlying conduct on which the Respondent's conviction of criminal sexual conduct in the second degree was based does not demonstrate that the Respondent is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act as an insurance producer, or otherwise warrant the denial of his license application under Minn. Stat. § 45.027, subd. 10, and it would not be in the public interest to deny the Respondent's license application.

8. Minn. Stat. § 364.03, subd. 1, states that, "[n]otwithstanding any other provision of law to the contrary, no person shall . . . be disqualified from

pursuing, practicing, or engaging in any occupation for which a license is required solely or in part because of a prior conviction of a crime or crimes, unless the crime or crimes for which convicted directly relate to the . . . occupation for which the license is sought.”

9. Minn. Stat. § 364.07 specifies that “the provisions of sections of sections 364.01 to 364.10 shall prevail over any other laws and rules which purport to govern the granting, denial, renewal, suspension, or revocation of a license . . . on the grounds of conviction of a crime or crimes.”

10. In determining whether a conviction directly relates to the occupation for which the license is sought, Minn. Stat. §364.03, subd. 2, specifies the licensing authority must consider the following factors:

- (a) the nature and seriousness of the crime or crimes for which the individual was convicted;
- (b) the relationship of the crime or crimes to the purposes of regulating . . . the occupation for which the license is sought;
- (c) the relationship of the crime or crimes to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the . . . occupation.

11. To the extent Chapter 364 applies, the Respondent’s conviction is not directly related to the occupation of licensed insurance producer within the meaning of Minn. Stat. § 364.03, subd. 1.

12. These Conclusions are reached for the reasons discussed in the Memorandum below. The Memorandum is hereby incorporated into these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

#### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED: that the Department’s denial of the Brett Maxwell’s application for a resident insurance producer’s license be REVERSED.

Dated: March 9, 2006

s/Barbara L. Neilson

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BARBARA L. NEILSON

Administrative Law Judge

Reported: Tape Recorded (not transcribed); 1 tape.

**MEMORANDUM**

In the Notice of and Order for Hearing filed in this matter, the Department alleged Respondent is not entitled to a resident insurance producer's license because he entered a guilty plea in 1997 to criminal sexual conduct in the second degree. The improper conduct involved the Respondent's sister-in-law, who was only eleven years old at the time she alleged the first incident occurred in 1993. The Department alleges this conviction disqualifies Respondent because it involves "moral turpitude." As noted above, Minn. Stat. § 60K.43, subd. 1(6), specifies that the Commissioner of Commerce may deny an application for a resident insurance producer's license if the Commissioner finds that it is in the public interest to do so and the applicant has "pled guilty . . . or been convicted of a felony . . . involving moral turpitude, including, but not limited to, assault or similar conduct."<sup>[10]</sup>

Moral turpitude is not defined in the statutes or rules governing licenses issued by the Commissioner of Commerce. The Department's investigator who considered the Respondent's application was not aware of any particular definition used by the Department and was unable to articulate the definition he used. *Black's Law Dictionary* defines "moral turpitude" as an "[a]ct of baseness, vileness or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rules of right and duty between man and man," and as an "[a]ct or behavior that gravely violates moral sentiment or accepted moral standards of (the) community." In a criminal context, moral turpitude refers to the "quality of a crime involving grave infringement of moral sentiment of the community . . . ."<sup>[11]</sup> In a previous case involving an application for a real estate salesperson's license, Administrative Law Judge Luis found that possession of child pornography was clearly a crime involving "moral turpitude" within the meaning of Minn. Stat. § 60K.43, subd. 1(6). Judge Luis noted that the act of possession of pornographic material depicting sexual activity by or with minors has been made criminal by the Minnesota Legislature in Minn. Stat. § 617.247 and that "the act of possessing such material is condemned because of the inherent base conduct and depravity involved as elements of the offense."<sup>[12]</sup> It is apparent that the Respondent's conviction of criminal sexual conduct in the second degree in violation of Minn. Stat. § 609.343 also involves elements of depravity and violation of accepted moral standards consistent with the common understanding of the meaning of the phrase "moral turpitude." The Commissioner thus appears to have the authority under Minn. Stat. § 60K.43, subd. 1(6), to deny the application of the Respondent.

The more difficult question, however, is whether Minn. Stat. §60K.43, subd. 1(6), should be interpreted to mean that a conviction of any crime involving moral turpitude must result in a permanent bar to licensure, regardless of the relationship between the crime committed and the licensure sought, the amount of time that has elapsed since the crime was committed, or the rehabilitation efforts of the applicant. Chapter 364 of the Minnesota Statutes declares that “it is the policy of the state of Minnesota to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the resumption of the responsibilities of citizenship” and notes that the “opportunity to . . . engage in a meaningful and profitable . . . occupation . . . is essential to rehabilitation and the resumption of the responsibilities of citizenship.”<sup>[13]</sup> Chapter 364 generally states that a person cannot be disqualified from pursuing a licensed occupation due to prior conviction of a crime unless the crime directly relates to the occupation for which the license is sought.<sup>[14]</sup> If the crime is, in fact, directly related to the occupation for which a license is sought, the person cannot be disqualified if he or she can show competent evidence of sufficient rehabilitation and present fitness to perform the duties of the occupation.<sup>[15]</sup>

Neither insurance licenses nor occupations licensed by the Department of Commerce are expressly exempted from Chapter 364.<sup>[16]</sup> However, as noted by the Department, Minn. Stat. § 45A.027, subd. 10, was later amended to state that Chapter 364 does not apply to an applicant where the underlying conduct on which the conviction was based would be grounds for denial of the license. Although this language is somewhat unclear, it appears to reflect legislative intent that an applicant for Commerce Department licensure who has committed a crime that directly relates to the licensed occupation cannot provide evidence of rehabilitation to overcome a disqualification from licensure. The proper interplay between Chapter 364 and Section 45A.027 remains somewhat uncertain since Chapter 364 itself specifies that it applies “[n]otwithstanding any other provision of law to the contrary”<sup>[17]</sup> and also states that sections 364.01 to 364.10 “shall prevail over any other laws and rules which purport to govern the granting . . . of a license . . . on the grounds of conviction of a crime or crimes.”<sup>[18]</sup> Moreover, final orders recently issued by the Commissioner of Commerce imply that concepts drawn from Chapter 364 are pertinent in determining whether licensure should be granted or denied.<sup>[19]</sup> In determining what, if any, effect the 1997 criminal conviction should have on the Respondent’s insurance licensure, the Administrative Law Judge recommends that the Commissioner be guided by the principles set forth in Chapter 364.

When those principles are applied here, the facts are not sufficient to support the conclusion that the Respondent’s conviction or the conduct underlying that crime directly relate to the occupation of insurance producer. The crime committed by the Respondent against his minor sister-in-law obviously was very serious and involved a breach of a trust relationship. However, the commission of that crime more than ten years ago does not bear a significant relationship to the purposes for regulating the insurance occupation or the ability,



capacity, or fitness required to perform the duties of an insurance producer. It is true, as the Department argues, that insurance producers may be entrusted with clients' money as well as financial information. Despite the Department's assertions, however, the Administrative Law Judge is not persuaded that the breach of trust inherent in the Respondent's criminal conduct demonstrates that he also would not be trustworthy in handling monies appropriately while acting as an insurance producer. There is no proper basis for a conclusion that the Respondent's criminal sexual conduct more than ten years ago would place insurance clients at risk or would make the Respondent more likely to engage in fraudulent, deceptive, dishonest, or untrustworthy activity while engaged in insurance sales. Further, the Respondent's lack of access to clients' money, lack of incentive for fraudulent conduct as an employee paid on an hourly basis, and absence of physical interaction with any client weighs even more strongly in his favor. Simply put, the Department failed to demonstrate any connection between the Respondent's inappropriate sexual contact in 1997 and his current pursuit of an occupation in insurance sales.

Even assuming for the sake of argument that the Respondent's crime is directly related to the licensed occupation, he has shown sufficient rehabilitation and present fitness to perform the duties of a licensed insurance producer. The Respondent readily admitted his misconduct by entering a guilty plea. The plea was entered in June of 1997, nearly nine years ago, and the three alleged incidents of sexual misconduct occurred more than ten years ago, in 1993, 1994, and 1995. The Respondent has been law-abiding since that time. He has successfully completed sentencing obligations, attended and completed two years of group treatment at a mental health center in Bemidji, attended more than six months of voluntary after-care, and continues to see his probation officer. His probation officer submitted a letter in support of his application. The Respondent has remained employed with the same employer for eight years. He truthfully disclosed the conviction on his license application filed with the Department. At the hearing, he admitted that he had committed a crime and did not attempt to deny or excuse his past misconduct. He is seeking licensure as a means to move on and improve his life and his ability to support his family. Although his probation will not expire until 2022, it is clear that the Respondent has provided evidence of his rehabilitation and present fitness.

Under the circumstances of this case, it does not appear to be appropriate to bar the Respondent's ability to be licensed based solely upon a 1997 conviction of a crime involving moral turpitude. This recommendation is not meant to minimize the nature and seriousness of the Respondent's criminal conduct or disregard the reprehensible nature of that conduct. However, in light of the lack of connection between this conduct and the types of activities involved in insurance sales, the fact that nine years has elapsed without any further criminal violation, the Respondent's honesty on his application, the policy of the State of Minnesota to afford criminal offenders an opportunity to engage in a meaningful and profitable occupation, and evidence of the Respondent's



rehabilitation, the Administrative Law Judge has recommended that the Department's denial of the Respondent's license application be reversed.

### **B.L.N.**

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<sup>[1]</sup> Testimony of Respondent. Although the name of the company has changed during that period of time, the management has remained the same.

<sup>[2]</sup> Ex. 1; Testimony of Respondent.

<sup>[3]</sup> Ex. 2; Testimony of Respondent.

<sup>[4]</sup> Exs. 3 and 4.

<sup>[5]</sup> Testimony of Respondent.

<sup>[6]</sup> Testimony of Cameron Jenkins.

<sup>[7]</sup> Ex. 4.

<sup>[8]</sup> Minn. R. 1400.7300, subp 5.

<sup>[9]</sup> Minn. Stat. § 60K.43, subd. 1(6).

<sup>[10]</sup> Minn. Stat. § 60K.43, subd. 1(6).

<sup>[11]</sup> *Black's Law Dictionary* (6<sup>th</sup> Ed. 1990), at 1008-09. In *In re Application for Discipline of Bunker*, 294 Minn. 47, 199 N.W.2d 628 (Minn. 1972), the Minnesota Supreme Court cited with approval a Wisconsin case (*State v. McCarthy*, 255 Wis. 234, 38 N.W.2d 679 (Wis. 1949)) setting forth similar definitions of "moral turpitude."

<sup>[12]</sup> *In the Matter of the License and Application for Licensure of Wells*, OAH Docket No. 7-1004-16567-2 (2005).

<sup>[13]</sup> Minn. Stat. § 364.01.

<sup>[14]</sup> Minn. Stat. § 364.03, subd. 1.

<sup>[15]</sup> Minn. Stat. § 364.03, subd. 3.

<sup>[16]</sup> See Minn. Stat. § 364.02, subd. 3 (defining the term "license" to include all licenses issued by the state of Minnesota before a person can engage in any occupation and defining the term "hiring or licensing authority" to mean state agencies or departments), and 364.09 (exempting the licensing process for peace officers, private detectives, school bus drivers, special transportation services, commercial driver training instructors, emergency medical services personnel, physicians, taxicab drivers, juvenile corrections employment, and teachers, and specifying that the Chapter does not apply to law enforcement agencies, fire protection agencies, and school districts).

<sup>[17]</sup> Minn. Stat. § 364.03, subd. 1.

<sup>[18]</sup> Minn. Stat. § 364.07.

<sup>[19]</sup> See, e.g., *In the Matter of Cosmetology License Applicant Holmes*, OAH Docket No. 1-1009-15616-2 (2004), *aff'd*, Commissioner's Order dated September 28, 2004 (in which the Commissioner noted that the Applicant's "long record of criminal convictions, including recent drug use, indicate that Applicant has not yet established rehabilitation and the ability to comply with the terms of his release from prison") and *In the Matter of the Application for a Real Estate Salesperson's License of Bubar*, OAH Docket No. 1-1005-12900-2 (2000), *aff'd*, Commissioner's Order dated April 12, 2001 (in which the Commissioner noted that the "nature of many of [the Respondent's] convictions also directly relate to the occupation for which he seeks a license").